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Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions

TBGI Subseries No. 18

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Comparative Research in
Law & Political Economy



Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions

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Karin Buhmann¹

Abstract:

This article analyses the United Nations (UN) Guidelines on Business and Human Rights adopted in 2011 by the UN Human Rights Council from the perspective of Transnational Business Governance Interactions (TBGI) analytical framework (Eberlein *et al.* 2014). The article identifies and discusses dimensions of interaction and components of regulatory governance which characterise the Guiding Principles, focusing in particular on the rule formation and implementation. The article notes that the Guiding Principles actively enrolled other actors for the rule-making process ensuring support in a politically and legally volatile field. It identifies mutual ‘piggy-backing’ by the Guiding Principles and other TBGI schemes, complementing the Principles’ very limited limitation and enforcement modalities and lending support to the rule-making and implementation of other schemes. The article concludes that the UN Guiding Principles are unique in several respects of relevance to transnational business governance interaction and indicate the relevance of the TBGI approach to public regulatory transnational business governance initiatives. The analysis of the Guiding Principles as interactional transnational business governance suggests that this form of governance offers prospects for public institutions as a means towards regulating global sustainability concerns.

Keywords:

UN Guiding Principles on Business and Human Rights (2011); TBGI analytical framework; transnational law, OECD’s Guidelines for Multinational Enterprises; orchestrating responsible business conduct

JEL Classifications:

D78 (Analysis of Collective Decision-Making: Positive Analysis of Policy-Making and Implementation); F23 (Multinational Firms; International Business); L51 (Regulation and Industrial Policy: Economics of Regulation)

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1. Introduction

The proliferation of private and multi-stakeholder public-private initiatives aiming to shape business conduct by non-enforceable forms of regulation in order to limit adverse business impact on society and promote sustainable global development has fascinated scholars from a range of disciplines for decades. While private initiatives like the Forest Stewardship Council (FSC) have a history of several decades, multi-stakeholder initiatives (MSI) organised by public organisations are more recent and pose more challenges to the literature on governance, regulation and Corporate Social Responsibility (CSR) (Scherer and Palazzo 2011). As evidenced by the UN Global Compact, launched by the (then) Secretary-General of the United Nations (UN), which is the world's largest international organisation whose members comprise most of the world's States, the evolution of transnational business governance schemes is not limited to private initiative. Indeed, with the adoption of the UN *Protect, Respect and Remedy* Framework in 2008 and its operationalisation through the 2011 UN Guiding Principles on Business and Human Rights, the transnational regulation of business impact on society has undergone significant evolution.

Although technically limited to the issue of human rights, the development of these UN instruments have brought publicly initiated schemes strongly onto the stage, in practice reaching beyond human rights. The UN Guiding Principles differ from both the UN Global Compact another important recent regulatory MSI CSR scheme, the ISO 26000 Social Responsibility Guidance Standard: unlike the Global Compact, they explicitly connect State law and private regulation; and unlike ISO 26000, which like many other business governance schemes was launched by a private organisation,² the Principles were developed from within a public international organisation. In terms of regulatory governance, the UN Guiding Principles are a novelty which connects elements of the state-centered international law not only to national law and legal institutions, but also to the forces of the market which drives many of the non-state business governance initiatives (Cashore 2002) in order to gain maximum influence on business conduct. The Principles comprise three complementary 'pillars': (1) the State Duty to Protect against human rights infringements at the horizontal level between individuals; (2) the Corporate Responsibility to Respect, which comprises both compliance with applicable laws and respect for social expectations of business organisations; (3) Access to Remedy, which implies that appropriate and effective remedies should be made available to alleged victims by States as well as by business organisations.

The Guiding Principles have already had significant influence on several other public and private business governance instruments, including the Global Compact, OECD's Guidelines for Multinational Enterprises, ISO 26000 as well as EU and national law and policy. With limited own specific implementation modalities, the Guiding Principles also interact with the Global Compact, ISO 26000, OECD's Guidelines, EU policy and law and national law for their implementation. The way in which the Guiding Principles as a publicly initiated multi-stakeholder initiative on business governance has claimed the stage potentially changes prospects for sustainability oriented transnational regulation of business governance. Maximising this potential may be improved through understanding of the interactional aspects.

² The International Organization for Standardization (ISO) is an independent, non-governmental organization made up of members from the national standards bodies of 163 countries. According to its website, ISO is the world's largest developer of voluntary International Standards (http://www.iso.org/iso/home/about/about_governance.htm and <http://www.iso.org/iso/home/about.htm>, last accessed 13 September 2013).

This article adds to this knowledge by discussing the Guiding Principles from the perspective of the Transnational Business Governance Interaction (TBGI) framework (Eberlein *et al.* 2014). The article shows that the Guiding Principles have worked around the political and institutional constraints of state-centred international law by actively involving or ‘enrolling’ private non-state actors in the development of business governance norms, and by ‘piggy-backing’ onto other transnational business governance schemes for their implementation.

With its main focus on the Guiding Principles, the article takes its empirical point of departure in an initiative which has been organised within a public regulatory setting. In adopting a public regulatory perspective to regulatory business governance and CSR, it follows the line of the sustainability ‘orchestration’ literature (e.g. Schleifer 2013, Abbott & Snidal 2013, Verbruggen 2013). More specifically, the UN Guiding Principles are examined as a type of transnational law. The analysis provides an intergovernmental and therefore, by implication, state-based perspective to the TBGI literature.

The article contributes to efforts to understanding the interaction between private and public regulation as governance modalities to shape business conduct to reduce adverse impact on society. It contributes to the literature on regulation and governance by discussing and explaining aspects of the UN Guiding Principles, a CSR instrument that has so far not been much discussed in this literature from the perspective of governance and transnational interaction (compare, however, Wood 2012, Muchlinski 2012). This contributes to discussions on the Guiding Principles and their precursor, the UN Framework, in the business ethics literature, which has focused on the moral background and possible conflicts between the legal and philosophical dimensions (Fasterling and Demuijnck 2013, Cragg 2012, Bernaz 2012, McCorquedale 2009, Wettstein 2009).

The article proceeds as follows: Section 2 explains the background that motivates the analysis of the Guiding Principles from the TBGI perspective. 2.1 introduces the political and regulatory backdrop to the Guiding Principles and sketches their interaction with other business governance schemes of a transnational character. 2.2 offers a literature review and draws up some challenges which the Guiding Principles pose to existing scientific knowledge. With a particular focus on transnational law, 2.3 describes the pragmatic approach adopted by the article to discuss transnational regulatory developments with legal implications. Section 3 sketches the TBGI analytical framework (3.1) and explains the methodology (3.2), focusing on key definitional issues and elements for the purposes of the current subject. Section 4 is the analysis of the Guiding principles from the TBGI perspective. 4.1 offers an overview of the Guiding Principles highlighting interactional aspects in their formation and implementation. 4.2 discusses dimensions of interaction and components of regulatory governance. 4.2.1 explains the background for the Guiding Principles with particular focus on the goal and agenda setting for transnational business governance through the UN. 4.2.2 examines TBGI dimensions and components of the Guiding Principles with regard to rule formation and 4.2.3 with regard to implementation. 4.2.4 briefly describes monitoring and information gathering, compliance promotion and enforcement, and evaluation and review, suggesting issues of transnational business governance interaction that may evolve as the Guiding Principles and their interaction with other TBG institutions mature. Section 5 concludes that the UN Guiding Principles are unique in several respects of relevance transnational business governance interaction, and show the relevance of the TBGI approach to public regulatory transnational business governance initiatives. In terms of regulatory perspectives targeting business governance, section 5 notes that the analysis of the Guiding Principles as interactional transnational business governance suggests that this form of governance is capable of migrating from private governance to becoming adopted

by public institutions as a means towards regulating global sustainability concerns. This conclusion complements related findings (Webb 2012) in relation to ISO 26000, which by contrast to the Guiding Principles started as a private regulatory governance initiative.

2. Motivation and general theoretical approach

2.1. The Guiding Principles and their influence on other business governance schemes

2011 was a year of ‘fast-forward’ movement in terms of public international regulation of business as regards their impact on society. With the Human Rights Council’s adoption of the Guiding Principles on Business and Human Rights, the controversial issue of business responsibilities for human rights found a resolution, which soon left its imprint on other CSR regulation. Already in May 2011, based on a draft of the Guiding Principles and their predecessor, the UN *Protect, Respect and Remedy* Framework (UN 2008a, ‘the UN Framework’), the Organisation for Economic Cooperation and Development (OECD) revised its *Guidelines for Multinational Enterprises* (OECD 2011a). The EU Commission responded by revising its definition of CSR to accord with the Guiding Principles and the OECD Guidelines. It also adopted the Guiding Principles’ recommendation for ‘smart-mix’ regulation, which entails a mixture of hard and soft law and other modalities intended to affect business conduct, such as guidance and incentives. In doing so, the 2011 EU Communication on CSR (EU 2011) underscored the role which the Guiding Principles playing in informing other public initiatives towards regulating CSR. This role had been visible also in chapters of social issues in the *ISO 26000 Social Responsibility Guidance Standard* (ISO 2010), which had been adopted in 2010 as an MSI instrument based on collaboration between business, governments, labour organisations, civil society, academics and other stakeholders.³ The Human Rights chapter of ISO 26000 was influenced by the UN Framework, as was a 2012 revision of the International Finance Corporation *Performance Standards on Environmental and Social Sustainability* (IFC 2012a). A member of the World Bank Group, IFC provides investment services to promote development in emerging economies and help reduce poverty. The Performance Standards provide guidance for IFC’s clients on how to identify risks and impacts. (IFC website).

A field once held to be voluntary action, CSR is increasingly coming to be subjected to public regulation. This takes place through regulatory modalities ranging from soft to hard public law as well as incentives and reporting (Buhmann 2013a and forthcoming, Ioannou & Serafeim 2012). Combining approaches of legal and organisational scholarship, the Transnational Business Governance Interactions (TBGI) framework proposed by Eberlein and others (2014) has been offered as an approach to conceptualisation and analysis of schemes applying non-state authority to govern business conduct across borders. Given that initiatives to regulate CSR are not, however, limited to non-state schemes, the scholarly need to understand interactional aspects of MSI schemes that emanate from public organisations is significant to fill the knowledge gap on the evolution and effects of such schemes. Similarly, in view of the influence that the Guiding Principles have already had on other CSR instruments, it is pertinent to understand how that instrument interacts with other instruments which promote or work through the exercise of ‘private authority’.

2.2. Challenges to existing knowledge

A plethora of private or public-private codes of conduct, process guidelines and reporting schemes have emerged in later decades to guide companies towards managing and limiting their adverse

³ ISO 26000 SR was developed over a five year period between 2005 and 2010 based on a multi-stakeholder process comprising industry, government, labour, consumers, nongovernmental organizations, academics and others.

impact on society. With national and particularly international policy and law-makers following, the 'voluntary'-'mandatory' dichotomy, which has marked much debate on CSR, is increasingly becoming obsolete (Mares 2012). Instead, business ethics oriented organisational, political science and legal scholars are seeking to understanding how public authorities are engaging in regulating CSR and by what modalities such regulation, which is often non-enforceable, works. Knudsen and Moon (2013), Fasterling and Demuijnck (2013); Scherer and Palazzo (2011) Knudsen (2011) and Matten and Moon (2008) theorize on ways in which public or public-private MSI regulatory activities affect CSR activities in companies. Organisational CSR research has undergone a shift in emphasis on CSR as based mainly on business interests and 'doing well by doing good' (Porter & Kramer 2006, Smith 2005, Moon 2004, Berman et al. 1999) towards greater recognition of CSR as a measure to address public policy interests. Matten and Moon's (2008) implicit-explicit CSR recognises that company conduct, especially in Europe, is influenced by governmental objectives. With the emergence of the UN Global Compact and other initiatives, organisational literature has taken to analysing how governments and intergovernmental organisations address CSR and what causes authorities to adopt measures to promote business self-regulation to minimise adverse impact on society (Rasche 2010, Margula & Steurer 2009, Reich 2007, Moon 2004, Haufler 2001). In their extensive discussion of the new political role of business in a globalized world, Scherer and Palazzo (2011) demonstrate that the division of tasks between governments and business is giving way to a more integrated approach in which companies not only assume social responsibilities that go beyond legal requirements, but also assume responsibilities which are basically of a political nature, in order to address governance gaps. The UN Guiding Principles have escaped much of this discussion as an instrument which functions through both public and private governance to influence business conduct.

Legal scholars have sought to grasp the soft, transnational and often public-private character of CSR-related regulatory initiatives that tends to fall between conventionally recognised categories of public or private, national or international law. In contexts of business economics and corporate governance legal scholars have long discussed the justification for managers' engagement in CSR (Berle 1931, Dodd 1932, Berle & Means 1932, Teubner 1985). More recently, international law oriented scholars have particularly taken to analysing the way in which CSR and public-private MSI initiatives are affecting boundaries between the public and the private regulatory sphere. Eberlein and others (2014), Krisch and Kingsbury (2006), Lobel (2005), Kingsbury, Krisch and Stewart (2005), Backer (2006) and Joerges, Sand and Teubner (2004) recognise that a blurring of boundaries between public and private, international and national law as well as politics and governance is occurring and theorise on implications for understanding interaction across those boundaries. Direct or implicit critique against the UN Guiding Principles thrives in both the organisational and legal literature (Fasterling and Demuijnck 2013, Deva (forthcoming), Bernaz 2012, Cragg 2012, Knox 2012, Mares 2012). However, so far, little analysis has been made of the interactional character and other features of the Guiding Principles that may allow this publicly initiated MSI initiative specifically targeting business impact on society to push change.

Scherer and Palazzo (2011) argue that current theorizing on the firm in the CSR literature has not yet sufficiently integrated the new political role of private business, explaining that much of the literature pursues an instrumental view of CSR and builds on an economic paradigm which advocates a strict separation of political and economic domains. The 'political CSR' perspective proposed by those authors "suggests an extended model of governance with business firms contributing to global regulation and providing public goods" (2011:900-901). Scherer and Palazzo (2011) recognise debates in legal studies, including the impact of globalisation on the regulatory

power of state institutions, the blurring of boundaries between the public and the private, and the difficulty of international organisations like the United Nations (UN) and the International Labour Organisation (ILO) in filling governance gaps resulting from state's lack of will or capacity to honour their obligations. They also recognise that with private and lower-level public actors and multi-stakeholder initiatives seeking to fill the governance gaps arising from the incapacity of international organisations and nation states, global governance is emerging as a new form of transnational regulation.

Governance gaps are precisely what have led political scientists to emphasise the impact of weak governance and the need for more effective public guidance or hard regulation of company conduct to limit adverse effects on society (Ruggie 2004, Ruggie 2007). Contrary to the discussions in much of the above literature, the 2008 UN Framework and the 2011 Guiding Principles address governance gaps specifically in terms of governments' omission of fulfilling their obligations under international and sometimes national law. By combining governmental duties (to protect against human rights violations, including but not only through national law) and business responsibility (to respect human rights, including through compliance with national law), the Guiding Principles seek to address the conditions of weak governance which allow business organisations to infringe on human rights. Simultaneously, the Guiding Principles play on other transnational business governance instruments for their implementation. The Guiding Principles offer a timely case for both contributing to filling the gap in the literature in terms of the interplay between public and private business governance, and providing the literature with enhanced insight into this instrument.

2.3. A pragmatic transnational law approach

In discussing the Guiding Principles as an example of transnational business governance, this article adopts the pragmatic approach within legal scholarship. Pragmatism as a scholarly approach allows for recognising observable facts even if these differ from doctrine (for example, the very limited role of business organisations in international law). In a legal context, a pragmatic approach entails arguments or analyses which stress the usefulness or expediency of particular actions or legal institutions, focusing on solving problems of reality rather than delving into abstract conflicts based in theory and doctrine (Tamanaha 1997). Because they cut across established and even 'carefully policed boundaries' (Trubek 2004:322) both in terms of legal and other social science theory and national territory, global social and environmental concerns do call for innovative approaches. In turn, this calls for a pragmatic approach, which for the purposes of the current article entails recognition of the blurring of boundaries between the public and private legal and policy domains, rather than a questioning of it.

Buying into the pragmatic approach to international law, some scholarly approaches recognise an increasing transnationalisation of international law. Transnational law applies to or involves public and private actors, often of an international respectively multinational character, and also often operates across the boundaries of national or regional legal systems. Transnational law merges elements of conventional public (international, regional, and sometimes even national) law and conventional private law as well as new forms of law and rule-making, including private self-regulation, such as corporate or sector-wise codes of conduct for companies with transnational operations (Zumbansen 2012, Koh 1997:2626-2627). Transnationalisation of law is partly a result of the fact that markets have internationalised while governments remain by definition bound by their borders. International law is becoming transnationalised when it relates to issues that used to be subject to private or national regulation, often in an effort to remedy governance gaps resulting from the inability by national legal systems to adequately regulate transnational business and its

social impact. From this perspective, the Guiding Principles may be considered a type of transnational law, which builds on conventional international law but goes beyond this in seeking to regulate business conduct across territorial borders.

Transgressing boundaries between public and private, national and international law, transnational law differs from the ‘stateless law’ that Gunther Teubner (1997, 2000) has discussed: stateless law skirts the state and suggests that the state is becoming insignificant for regulatory purposes with regard to transnational activities of the private sector; transnational law by contrast recognises a role for states and organisations created by states (intergovernmental organisations) in a regulating concerns of a transnational character that often involves private actors.

3. Analytical framework: Transnational Business Governance Interactions

3.1. The TBGI framework

The TBGI framework proposed by Eberlein *et al.* (2014) offers a matrix for analysis of interaction across six dimensions of interaction and six components of regulatory governance. The full matrix provides a detailed mapping of interaction: who or what interacts, divers and shapers, mechanisms and pathways, character of interaction, effects of interaction and change over time; in combination with the components: goal/agenda setting, rule formation, implementation, monitoring and information gathering, compliance promotion and enforcement, and evaluation and review (Eberlein *et al.* 2014: 7). The dynamics may be explored at diverse levels of detail, focusing on selected aspects of interaction or mapping all aspects of interaction (as illustrated by Eberlein *et al.* with regard to forest governance (2014:15)).

The TBGI framework has been proposed as an analytical framework for identifying and analysing a series of dimensions of interaction comprising various components of regulatory governance. Through identification and analysis of interaction between dimensions of interaction and components of regulatory governance, the TBGI framework “allows scholars to investigate the drivers, forms, causal mechanisms, and pathways of [transnational business governance], as well as effects on regulatory capacity, performance and outcomes”. The theory based point of departure for the framework is the definition of transnational business governance (TBG) as “systematic efforts to regulate business conduct that involve a significant degree of non-state authority in the performance of regulatory functions across national borders” (Eberlein *et al.* 2014:3).

Only some of the key elements of the definition have been explained for the purposes of the TBGI analytical framework. ‘Transnational’ refers to arrangements across borders which involve “significant non-state authority” (Eberlein *et al.* 2014: 3). What is understood by ‘non-state’ or ‘significant authority’ is not made explicit, leaving the elaboration open. By contrast, ‘state’ is understood to “denote all institutions of the state, including international, supranational, and trans-governmental structures” (2013: 3). In other words, international organizations like the UN and the OECD are included in principle. ‘Business’ indicates commercial activity. It is this activity that is being ‘regulated’ under TBGI schemes. ‘Governance’ actually refers to ‘regulatory governance’, that is governance through state or non-state regulation in terms of “organized and sustained attempts to change the behavior of target actors to further at collective end, through rules or norms or means of implementation and enforcement” (2013: 3 with reference to Held & Held 2011 and Levi-Faur 2013).

Despite the definition's emphasis on non-state authority, the TBGI framework has been applied to sustainability or CSR related issues with a strong public governance element, such as EU regulation of forestry legality (Overdevest & Zeitlin 2014) and state responses to non-state certification programmes (Guldbrandsen 2014). Indeed, in introducing the TBGI framework Eberlein *et al.* (2014: 3) recognize that TBGI schemes may involve a range of heterogeneous actors, such as individuals, technical experts, political entrepreneurs, NGOs, business organizations and government agencies. While they do not make explicit what is understood by 'significant non-state authority', they explain that the framework is applied to initiatives in which non-state actors exercise such authority either alone or *with* state actors (Eberlein *et al.* 2014: 3, emphasis added).

The TBGI framework focuses on interactions between actors and schemes, and between schemes and state institutions. Interactions may be within a sector or across sectors. They may be "symmetrical or asymmetrical, antagonistic or synergistic, intentional or unintentional" (Eberlein *et al.* 2014: 3-4).

It is this interactional focus that makes it interesting to apply the TBGI perspective to the UN Guiding Principles. Due to their combination of state-based rules and institutions and their aim to regulate business activities across territorial and sector-specific boundaries, the Guiding Principles constitute a unique development in transnational business governance. Initiated within a quasi-legislative body⁴ under an international organization, the Guiding Principles are interactional across institutions and state and non-state authority both in their background and normative sources, and for their implementation and influence. Several key instruments, which as noted above have been influenced by the Guiding Principles and their precursor, the UN Framework, have TBGI features. This applies to ISO 26000 (Webb 2012), as well as the Global Compact, the IFC Performance Standards and the 2011 revision of the OECD Guidelines for Multinational Enterprises. Lacking enforcement modalities of their own and detailed implementation structures, the Guiding Principles also draw on procedural elements under those other TBGI schemes for their own implementation as regards business governance.

3.2. Methodology

Acknowledging that transnational business governance interactions involve heterogeneous actors and vary as regards interests pursued, values and other foundational aspects (Eberlein *et al.* 2014: 3-4), the TBGI framework allows for a degree of flexibility as regards analysis of the dimensions, components and dynamics. The TBGI model's appeal to scholars from diverse fields of regulatory governance naturally invites as diverse methods to be applied. The current article analyses the Guiding Principles from the pragmatic approach to transnational law indicated above, focusing particularly at the ways in which the Guiding Principles were evolved through interaction between public and private actors involved in the rule formation process and the implementation of the Guiding Principles through interaction with other transnational business governance instruments. The method is document study applying the legal method of document study to identify sources of law, including law-in-the-making, and legal (reflexive law informed) discourse analysis. The former

⁴ The UN Human Rights Council has preparatory functions for international human rights law which is formally adopted by the UN General Assembly. That and its ability to develop resolutions that endorse other soft law instruments provide it with a quasi-legislative role. For reference to the Council as quasi-legislative, see also Ruggie, John (2013) *Just Business*, W.W. Norton & Company, at xiii. The same applied to the Council's predecessor, the Commission on Human Rights, which drafted the first mandate of the SRSG on Business and Human Rights, and which debated and rejected the Draft Norms on Business and Human Rights, which had been developed by an expert Sub-Commission under that Commission.

entails the legal method of studying legislative history including informing policy objectives, and similarly as regards implementation. The latter entails a legal discourse analytical take on the construction of business responsibilities for human rights through the process that led to the UN Framework on which the Guiding Principles and their implementation build [details to be provided, see comments in footnote].⁵ This method entails a close reading of documents and analysis of interaction and interdiscursivity between documents and the way in which involved actors deploy these strategically to influence other actors towards sensitisation and agreement on specific interests (Buhmann 2012a, Buhmann 2013b).

In this article, the TBGI dimensions are understood as follows: ‘Who and what interacts’ are the institutions (private, public including inter-governmental organisations and their sub-institutions, such as the UN Human Rights Council, and civil society) and key individuals holding specific institutional tasks (*in casu*, the holder of the mandate as the Special Representative of the UN Secretary-General on Business and Human Rights (‘SRSG’), John Ruggie).⁶ ‘Drivers and shapers’ are understood as the background interests that actors pursued or which motivated actors to engage in the interaction. By ‘mechanisms and pathways’ this article understands the specific communicative modalities, including networks, discursive strategies and technical forms of communication. ‘Character of interaction’ is the degree of competition, co-optation, chaos or alignment between interacting instruments or institutions, whereas the ‘effects of interaction’ is the result, and ‘change over time’ in this article focuses on normative change in the concept and regulatory directives on business responsibilities for human rights.

4. The UN Guiding Principles: Interactional aspects of regulatory governance

4.1. Overview

The background to the Guiding Principles was a series of failed efforts within the UN to establish an instrument to regulate business impact on society, followed by the success of the immediately preceding initiative. The first major and comprehensive effort by an international organisation to develop an instrument to regulate business conduct stretched from the 1970s into the 1990s. Drafted by the UN Commission on Transnational Corporations, the draft UN Code of Conduct on Transnational Corporations⁷ had been intended to prescribe duties for transnational corporations (TNCs) to respect host countries’ development goals, observe their domestic law, respect fundamental human rights, and observe consumer and environmental protection objectives. In 1998 an expert group under a Sub-Commission under the UN Commission on Human Rights set about to draft guidance for business conduct with regard to human rights. The final version, the draft Norms

⁵ This analysis builds on a detailed study conducted under a grant from the Danish Research Council for the Social Sciences [for the sake of ensuring anonymity, details will be provided under acknowledgements after review, and reference to the detailed study will be inserted here].

⁶ It is important to note that John Ruggie, who is also an academic and Professor at Harvard University, developed the Guiding Principles and their predecessor, the UN Framework, in his capacity as holder of the UN mandate. Thus, although the UN Framework and the Guiding Principles are sometimes referred to as the ‘Ruggie Framework’ and the ‘Ruggie Principles’, they are not the brainchild of an academic in his academic capacity that might be unrelated to the overall political and regulatory governance context, but of a holder of a UN mandate who was charged with a specific set of tasks that arose precisely on the background of that context and were set out in resolutions by the UN Commission on Human Rights and the UN Human Rights Council (UN 2005, UN 2008b respectively).

⁷ The Commission was established by the Economic and Social Council under resolution 1913 (LVII), 5 December 1974. The most recent version of the draft Code dates from 1990 (*Draft Code of Conduct on Transnational Corporations*, UN Doc. E/1990/94, 12 June 1990).

on Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises (UN 2003), was debated by the Commission for Human Rights in 2004 and 2005. Due to political disagreements between States, which were members of the Commission, the Draft Norms failed to generate sufficient support for recognition. The Commission instead recommended that the UN Secretary General appoint a Special Representative to deal with the issue of business and human rights (UN 2005). The mandate was charged upon Professor John Ruggie as Special Representative of the Secretary-General. In June 2008 the UN Human Rights Council (which in 2006 succeeded the Commission on Human Rights) ‘unanimously welcomed’ the *Protect, Respect, Remedy* Framework (UN 2008a), commonly referred to as ‘the UN Framework’ or, sometimes, ‘the Ruggie Framework’. A second mandate (UN 2008b), asking John Ruggie to ‘operationalise’ the framework, resulted in the *Guiding Principles* (UN 2011a).

For development of both the UN Framework and the Guiding Principles, the SRSG and his team engaged in broad consultations involving intergovernmental organisations, state representatives, civil society, business organisations, and academics (for details, Knox 2012, Buhmann 2012a).

Soon after the adoption of the Guiding Principles, the UN Global Compact website on guidance for the Compact’s human rights principles (Principles 1 and 2) was updated to refer to the UN Guiding Principles (Global Compact website). A link to and explanation of the UN Framework had been uploaded to the Global Compact website in 2008. Already before the formal endorsement of the Guiding Principles, the UN Framework and the Guiding Principles (in their November 2010 draft version) were taken into consideration by the OECD in the revision of the Guidelines for Multinational Enterprises, which was adopted in Paris in May 2011 (OECD 2011a). The revision included a full new Chapter on Human Rights; an integration of the Due Diligence approach of the Guiding Principles not only to human rights but also to other issue areas covered by the Guidelines; and a revision of the ‘National Contact Points’ (NCP) complaints mechanism in accordance with the Guiding Principles’ procedural standards for remedies. The OECD Guidelines are recommendations addressed by governments to MNEs operating *in* or *from* adhering countries.⁸ The territorial scope of the Guidelines means that companies may be subjected to grievances in front of home state NCPs for actions committed even in non-OECD states. Addressing both parent companies and local entities within a MNE, the Guidelines provide non-binding principles for enterprises with the aim of promoting positive contributions by enterprises to economic, social and environmental progress (OECD 2011a, Chapter 1).

Relationships between the ISO 26000 Social Responsibility (SR) Guidance Standard and the Guiding Principles are more complex. On the one hand, the section on human rights was aligned with the UN framework on the corporate responsibility to respect human rights, relating to the due diligence concept elaborated by the latter (clause 6.3). On the other hand, the influence was narrow as to the contentious issue of an organisation’s ‘sphere of influence’. The concept of ‘sphere of influence’, which has also been employed by the Global Compact since its launch and was also included in the Draft UN Norms, was the object of considerable attention and research by the SRSG’s work during his 2005-2008 mandate. This led to a rejection of the concept in favour of a process which the SRSG termed Human Rights Due Diligence (UN 2008a, 2008c). The SRSG and his team argued that it would be counterproductive to apply the concept of ‘sphere of influence’ to ISO 26000, characterizing the concept as ambiguous, misleading, morally flawed, and susceptible to strategic gaming. The final version of ISO 26000 was amended in an effort to accommodate

⁸ Besides OECD countries, some non-OECD countries, including Argentina, Brazil and Egypt adhere to the Guidelines.

these objections (Wood 2011). ISO 26000 does not apply the concept to organisations' impact but retained the concept in relation to what the Guiding Principles refer to as 'leverage' (an organisation's capacity to influence other organizations' decisions). Indeed, as SRSG John Ruggie (who had also been instrumental in the establishment of the Global Compact) had recognized that the concept of 'sphere of influence' can be useful in other contexts that the corporate responsibility to respect human rights, for which he rejected it (UN2008a). This suggests that the Guiding Principles interact with other transnational business governance instruments in diverse ways. The subsequent sections investigate this interaction with particular focus on two components of interactions: rule formation and implementation (4.2.2 and 4.2.3). In order to set the context, dimensions of interaction framing the goal and agenda-setting are briefly set out (4.2.1). This is done with a particular focus on the global governance challenges (Ruggie 2013, 2014) and interactional process that formed the foundation for the rule formation process of the Guiding Principles and their implementation. The components of monitoring and information gathering, compliance promotion and enforcement, and evaluation and review are only briefly indicated (4.2.4), mainly to suggest future perspectives for both practice and research. Due to the novelty of the Guiding Principles these components are not yet very evolved.

4.2. Dimensions of interaction and components of regulatory governance

4.2.1. Background to the Guiding Principles: Goal and agenda setting for transnational business governance through the UN

As indicated, the Guiding Principles operationalise the UN Framework on Business and Human Rights. The two therefore at an overall level share the same *goal* and contribute to the same general *agenda setting*. But the UN Framework which broke the ground for the Guiding Principles' explicit and detailed transnational business governance within UN of a transnational law type approximating conventional international law. The UN Framework also differed from the UN Global Compact, which was also a groundbreaker in terms of establishing guidance for business, but does so in a much softer fashion which builds on voluntary business commitment.

An activity initiated under the UN Human Rights Council, the overall *goal* of the Guiding Principles on which the Guiding Principles build is to contribute to sustainable development in accordance with the UN's objective as stated in the UN Charter article 1.⁹ The UN Charter was drafted in the conventional state-centrist international law context, in which business organizations hold no place as bearers of duties. The Universal Declaration on Human Rights, which was developed to spell out the substantive contents of the human rights that the UN Charter refers to in a general way, in its preamble makes reference to 'all organs of society'. In 1948 when the Universal Declaration was adopted, businesses were not thought to be included among such organs (Henkin 1999: 24-25; Mayer 2009). Nor is it likely that anyone fathomed that within a few decades would business organizations be so economically and politically powerful as to pose significant risk to human rights in a way that would not be easily regulated under the law of their home state.

As an operationalisation of the UN Framework, the Guiding Principles in terms of their more immediate *goal and agenda* refer back to the UN Framework and the objective of the SRSG's first

⁹ In particular in this context the Charter's art. 1, section 3, which states, according to which the purposes of the UN include "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

mandate.¹⁰ This came about in part as a result of the attention increasingly paid by the UN to the capacity of business organizations to cause human rights violations. This owes much to civil society organizations, such as global Non-Governmental Organisations (NGOs) like Amnesty International and Human Rights Watch as well as numerous regional and local NGOs. These *actors* have played a key role in getting the issue on to the agenda of the UN, eventually leading to the Guiding Principles through the establishment of the SRSG's 2005-2008 mandate and the preceding debates on the Draft UN Norms. Some sustainability oriented business organizations, such as the World Business Council for Sustainable Development (WBCSD) and Business for Social Responsibility (BSR) have also played a role in this respect. Especially since the late 1990s such organizations as well as academics and some governments had interacted to convince policymakers and international regulators of the necessity of developing a transnational normative framework with the capacity to govern business conduct, especially but not only where a company's home country is not the same as the country in which it causes adverse social impact (Bendell 2004).

A combination of the limitations of the conventional system of international law and the actors' interests, values, perceptions and resources were at play, working as *drivers and shapers*. Constraining the adverse impact of multinational enterprises on society presented a particular challenge to the UN as an international organization with a state-centrist structure. Based on the conventional (Westphalian) conception of international law, UN rule-making tends to address states. International law-making in the human rights field in particular is constituted by obligations for states, and rights for individual persons. Nothing technically impedes international law to regulate companies, but as evidenced by the fate of the Draft UN Code of Conduct and the Draft UN Norms, political will among states as international law-makers has been limited in terms of introducing binding requirements on companies to regulate their conduct and its environmental and social impact. Sustainability related obligations on companies have been introduced in a limited number of areas, in particular in the environmental field.¹¹ Where the Draft UN Norms had failed, the UN Framework succeeded and created the basis for the Guiding Principles. The Norms failed partly because of antagonism caused by the treaty-like language that led to lobbying by some large business organisations, and perhaps also due to limited insight into the often protracted international law-making process and its many steps towards a fully-fledged treaty (Kinley and Nolan 2007, Buhmann 2012b). The UN Framework was accepted partly due to the innovative and inclusive multi-stakeholder process, partly because the insistence by the SRSG to refer to it as a 'policy framework' although in effect much of its contents has a soft law character. The novel transnational business governance framework offered by this approach allowed for agreement across past antagonism and across the intellectual and political boundaries of state-centrist international law.

¹⁰ The SRSG's 2005-2008 mandate was defined as follows:

- (a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
- (b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
- (c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as "complicity" and "sphere of influence";
- (d) To develop **materials** and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
- (e) To compile a compendium of best practices of States and transnational corporations and other business enterprises (Commission on Human Rights 2005, para. 1).

¹¹ For example, the 1969 Convention on Civil Liability for Oil Pollution Damage and the 1982 UN Convention on the Law of the Sea.

Politically it would be difficult for the actors who had supported the Framework and adopted the Resolution which asked the SRSG to ‘operationalise’ the Framework not to adopt the resulting Guiding Principles (De Schutter forthcoming). This allowed for the adoption of a transnational business governance instrument, which departed from the ‘policy’ title of the UN Framework by taking a step ‘back’ into conventional international soft law speak by adopting a name – ‘Principles’ – which resonates with other international soft law instruments. This is an interesting example of the dynamics at play, which also involved an interaction between politics and law in terms of practice as well as theory: The ‘policy’ title of the UN Framework exemplifies the SRSG’s pragmatic approach to the highly politicized character of the evolution of potential business duties for human rights under international law. By referring to the UN Framework as a policy instrument, its character was discursively ‘de-legalized’ and therefore de-politicized. This made its broad acceptance by actors easier, also among both states and business representatives that had been opposed to the Draft UN Norms (Buhmann 2012b). Once the UN Framework was broadly accepted, the basis was in place for a formal adoption of the operationalization mandate (UN 2008b). Having accepted the UN Framework (even as a ‘policy instrument’), the UN Human Rights Council was set on a course towards also accepting the operationalization. Naming the operationalization document – the Guiding Principles – by a recognised form of international soft law was a bold step by the SRSG in that it might have generated resistance like the UN Norms, but having created a sound political basis, the reception of the soft law term was completely different in this case.

The *mechanisms and pathways* applied by the SRSG and other actors to establish the goal and set the agenda involved interest-based networks and discursive strategies. This has been described in detail by Buhmann in her analysis of the discursive construction of the UN Framework and evolution of background for the Guiding Principles (2012a, 2012b, 2013b). Related networking and strategies has been applied with success in other sustainability contexts, including some related to business governance (Reinalda 2001, Hajer 1995). In the context of business and human rights, these networks and strategies generated acceptance of the need for a transnational business governance instrument that had the authority of the UN and responded to global social expectations of business conduct not only in compliance with applicable law but also with business ethics or CSR.

As regards *character of interaction* (as defined by Eberlein *et al.* 2014: 16), the UN Framework process came to develop a degree of coordination towards an agenda in a way that combined diverse interests within an overall goal of reducing the risk of business related human rights violations. This was very different from the Draft UN Norms that had been marked by competition and chaos (Kinley, Nolan and Zerial 2007). Initially, interaction between civil society and some business organizations involved in the development of the UN Framework had carried over competition from the UN Norms process. Later, this gave way to some coordination involving different stakeholder types and groups, with acceptance induced by the SRSG’s discursive articulation of diverse stakeholders’/actors’ specific interests (Buhmann 2012b). The *effect of interaction* was the creation of an acceptance among international policy-makers in the UN Human Rights Council and among business and civil society organizations of the need for a transnational business governance instrument on human rights. This ensured collaboration rather than antagonistic counter-action throughout the SRSG’s second mandate, and therefore facilitated the process that eventually led to the Guiding Principles.

From the launch of the draft UN Code of Conduct via the debate of the Draft UN Norms through the UN Framework to the Guiding Principles a significant *change over time* took place. While in all

of these cases, there was broad although not universal support for the launch of the process to develop a transnational business governance instrument, only the UN Framework and Guiding Principles processes were successful towards delivering an output that was accepted. A number of institutional factors differ, such as the geopolitical agenda (which in the case of the Draft Code of Conduct between the 1970s to the early 1990s shifted from a North-South conflict under influence of the Cold War and the New International Economy agenda to a geopolitical context informed by the end of the Cold War and new geopolitical constellations and trends in economic growth and investment) and the body that initiated the process. In the case of the Draft UN Norms, this was an expert body under the politically composed UN Human Rights Commission, in the case of the UN Framework the UN Secretary-General based on recommendations by the Human Rights Commission, and in the case of the Guiding Principles the new UN Human Rights Council, a politically composed body having succeeded the Commission, and which had already adopted the UN Framework.

The rejection of the Draft UN Norms by the Commission for Human Rights led the Commission to the adoption of the first SRSG mandate. This step by itself reflected an acceptance of the goal and agenda of a process of developing a transnational business governance instrument on human rights to reduce business related human rights abuse, probably combined with a political desire to be in charge of the process and the agenda setting rather than leaving it to human rights law experts and conventional ways of drafting international human rights law. This part of the agenda setting objective is reflected in the SRSG's mandate (UN 2005), which explicitly called on the mandate holder to involve and consult with not only 'the usual suspects' of international human rights law-making – governments, intergovernmental organisations and human rights NGOs – but also to involve business. That mandate led to the UN Framework, which in turn created the background for the SRSG's second mandate and the specific interactional rule formation process that resulted in the Guiding Principles.

Having set the backdrop, the subsequent sections look specifically at the Guiding Principles, starting with interaction towards rule formation.

4.2.2. Rule formation

As regards *who and what interacted* in the process that created the Guiding Principles, the Guiding Principles are the result of an unusual interaction between the UN Human Rights system and non-state actors. The SRSG adopted a broadly consultative process already for the development of the UN Framework, and continued this during his second mandate, which resulted in the Guiding Principles. In both cases, that approach was had been included in the task set out by the Commission for Human Rights and the Human Rights Council respectively. They had invited the mandate holder to undertake a broad stakeholder oriented approach and to consult with companies, states, inter-governmental organizations and civil society (UN 2005, UN 2008b). Yet, a formal invitation to consult need not translate into active consultation, let alone into interaction between diverse actors in various meetings. Business organizations had been consulted during the later stages of the formulation of the Draft UN Norms, but in a way that led at least some but rather influential organizations to characterize the process as insufficiently inclusive of business (Kinley, Nolan and Zerial 2007: 40, Backer 2006: 321-327, Hearne 2004).

From the outset, the SRSG's broadly consultative process included not only those governmental, intergovernmental and non-governmental actors who are conventionally consulted in international law-making on human rights, but also private sector actors, who in the pertinent context were

prospective duty-bearers. Due to the state-centrist structure of international law, the private sector is normally excluded from international law-making. Civil society has long been included in consultations for the development of human rights law, but this has generally been in the capacity of representatives of victims and other holders of rights, not as bearers of duties. The integration of business representatives into the process ensured in a pragmatic fashion that businesses organisations were given ownership for the process of rule formation. By doing this, the SRSG effectively heeded points that had been made decades ago by international law scholars who already then saw a need for regulating business conduct and understood that involvement of business in the rule-making process would cater for acceptance (Friedman 1964, Charney 1983). Obviously, inviting specific actors (*in casu* business) into a rule-making process that aims to regulate these actors conduct may entail a risk that the process of rule-making is diluted. Yet both Friedman and Charney held that without being actively involved as participants in the rule-making process, businesses might not wish to engage actively with the implementation of resulting rules. Related observations on participation as an element in ‘process legitimacy’ in an international law rule-making context in order to provide resulting rules with a compliance pull in place of a strong enforcement system have been made by Thomas Franck (Franck 1990, see also Ruggie 2013: 168). As explained by Buhmann and Ryngaert (2012), by strategic usage of the discursive construction of rule-making within a reflexive law context, the SRSG succeeded in engaging even previously strongly opposed business organisations in active participation leading to detailed guidance on business conduct. Whether this will translate into an effective ‘compliance pull’ at the time of writing remains to be assessed in detail.

The integration of business and other non-state actors into the process of rule formation was further supported by a discursive strategy which articulated the interests of business as well as other involved actors/stakeholders (Buhmann 2012a). This effectively functioned as an articulation of *drivers*, which helped generate interaction among stakeholder to shape the drafting of the Principles and achieve acceptance of the outcome. Once the battles on the UN Norms and the mandate for the SRSG’s first term had been fought and the UN Framework adopted by the Human Rights Council, the *character of interaction* as regards the goal and agenda for the Guiding Principles shifted towards a sort of cooptation through which the outcome – the Guiding Principles – took on a meta-regulatory effect with certain elements achieving a quasi-monopolistic position. A particularly strong example of this is the influence which rule formation of the Guiding Principles had on the OECD Guidelines for Multinational Enterprises as regards Due Diligence and remedial procedures (below and discussed in detail in Buhmann (forthcoming)). Another example is the influence on ISO 26000 that was exerted by the SRSG’s conceptions of the ‘sphere of influence’ and Human Rights Due Diligence (Wood 2011).

As an *effect of the interaction* between non-state and state actors, the norm formation process resulted in a detailed instrument comprised of 31 Guiding Principles, which spell out the implications of the UN Framework provisions, emphasising operational aspects for states as well as businesses. For each of the three Pillars, the Guiding Principles set out some foundational principles and some operational principles. The two foundational and eight operational Principles on the State Duty to Protect are followed by five foundational and nine operational Principles (11-15 and 16-24 respectively) on the Corporate Responsibility to Respect, which in turn are followed by Principles on Access to Remedy, comprising one foundational and six operational Principles (25 and 26-31

respectively). Each of the Guiding Principles is accompanied by a detailed commentary contained in the same report as the one which sets out the Principles.¹²

Although the Guiding Principles were formally authored by the SRSG, they resulted from a collaborative process that involved not only the SRSG and his 'team' as an author collective, but also a process in which partial conclusions were offered for debate through annual reports and detailed elaborative addenda to the Human Rights Council. These were widely shared on the internet and generating diverse responses, comments and suggestions from a range of actors, including state, business and business associations, and civil society including academics. Perhaps even more importantly, as in the case of the UN Framework this was a process in which elements were tested with diverse audiences including multi-stakeholder meetings around the world as well as specific civil society, business or (inter-)governmental groups before they were revised and refined for incorporation into SRSG reports (Ruggie 2013, Buhmann 2012b). Although the SRSG retained the final role as the editor and the person who selected what responses to include and how to do so, as a result of the collaborative process the Guiding Principles may be perceived to build on interaction between state and intergovernmental, business and civil society actors.

4.2.3. Implementation

As regards *who or what interacts*, the implementation of the Guiding Principles as a business governance instrument is based on a combination of interactions between public and private institutions, drivers and mechanisms. At the overall UN level, implementation is supported by the establishment of a Working Group on Business and Human Rights, which is comprised of five experts in the field and undertakes field visits, organizes surveys and engages with stakeholders, including through the Annual Forum on Business and Human Rights. The Forum is a two-day event taking place at the UN in Geneva and in particular targets non-state stakeholder from business, civil society and academia, without however excluding state-actors. In addition, the Guiding Principles are implemented through activities at the level of nation states as a result of the State duty to protect, which is elaborated in the Principles' Pillar One.

In practice, however, much of the implementation takes place through the Guiding Principles' influence on or integration into other transnational business governance instruments. Interaction with and between institutions such as the UN Global Compact and NCPs established under the OECD Guidelines therefore plays a major role in the implementation. Interaction between the SRSG and the OECD for the 2011 revision of the Guidelines for Multinational Enterprises and the ISO 26000 formulation process played a major role as *drivers and shapers* for the integration of the Guiding Principles towards implementation in the practices of business organizations as well as state action under the State Duty to Protect: because the Guiding Principles have no enforcement mechanism of their own and as noted above limited specific implementation modalities, the potential for implementation through other transnational business governance instruments worked as a strong driver for interaction and shaper of the form of interaction and its normative output.

Also among this category, interaction between the SRSG and the process of formulating the 2012 International Finance Corporation (IFC) Performance Standards affects implementation of the Guiding Principles through integration into environmental and social risk assessment. The IFC Standard applies to all investment and advisory clients whose projects go through IFC's initial credit review process (IFC 2012a, IFC 2012b). Through their own TBGI character, in particular their

¹²To further explicate the Guiding Principles on the corporate responsibility to respect, the UN Office of the High Commissioner for Human Rights in 2012 published an interpretive guide (OHCHR 2012).

goals, actors and mechanisms, these institutions integrate the Guiding Principles as parts of their own recurrent rule formation to be implemented, monitored, promoted and evaluated through their own modalities. As in most cases those are more elaborate and build on detailed procedural rules, they support and promote the implementation of the Guiding Principles.

In other words, the Guiding Principles ‘piggy-back’ themselves towards implementation through interaction with related TBGI institutions albeit in fields that are only partially associated with human rights. The piggy-backing is mutual: the solidity of the Guiding Principles as a form of new international soft law endorsed by the Human Rights Council provides the TBGI schemes that integrate elements of the Guiding Principles with an element of authority gleaned from the UN system at the political and quasi-legislative level. This authority lends legitimacy to TBGI schemes of less global (OECD), less formal (UN Global Compact) or less ‘law-like’ regulatory character (ISO 26000). And the attention which has been paid by business organizations, civil society organizations, intergovernmental organizations and governments to the Guiding Principles as solid and authoritative advice on business conduct also shines on the institutions that have adopted elements from the Principles. Sharing a common transnational governance task and a common problem of navigating in an area of weak enforcement institutions, the Guiding Principles have functioned as a driver and shaper of other CSR-related TBGI institutions to mutual benefit. The OECD Guidelines’ integration of the Guiding Principles’ process oriented due diligence concept is a particularly clear example of this: With the 2011 revision, OECD’s Guidelines not included a full new human rights chapter in line with the Guiding Principles and integrated the due diligence process. The also apply the Guiding Principles’ due diligence process requirement to most of the issue areas covered by the Guidelines, including labour/industrial relations, environment and anti-corruption. The OECD Guidelines and the grievance institutions called National Contact Points that adhering states commit to establishing therefore function as a state-based implementation modality for the Guiding Principles. The jurisprudence of the NCPs across the range of most of the OECD Guidelines’ issues areas as well as guidance developed by the OECD may contribute to ongoing elaboration of what is expected by businesses in terms of a due diligence process in accordance with the UN Guidelines.

Such institutions function as *mechanisms and pathways* of interaction across TBGI schemes, supporting the implementation of the Guiding Principles towards impacting business governance. The OECD Guidelines’ integration of the Guiding Principles’ due diligence concept expresses a type of mimicry (Guldbrandsen 2014), the effects of which have multiplied through the Guidelines’ application of the due diligence concept to most issue areas covered by the Guidelines.¹³ The Global Compact’s referencing the Guiding Principles in its guidance materials on human rights draws on the authority of the Guiding Principles while offering the Guiding Principles a path into the CSR policies and activities of the more than 11,000 business organizations which are members of the Global Compact.¹⁴ ISO 26000’s interaction with the SRSG on the concepts of ‘sphere of influence’ and (human rights) due diligence constituted a cognitive pathway of learning. This incorporated the outcome of analyses made during the SRSG’s mandates and of interaction with diverse actors

¹³ The Guidelines’ due diligence recommendations do not apply to the chapters on Science and Technology, Competition and Taxation (OECD 2011, Commentary to General Principles, para. 14).

¹⁴ The Global Compact’s Guidance Material website on Human Rights opens by noting ‘In June 2011, the UN Human Rights Council endorsed Guiding Principles on Business and Human Rights, which, among other things, provide guidance for business on how to implement the corporate responsibility to respect human rights, a key element of Global Compact Principle 1 and 2’, and offering a link to the Guiding Principles in the six UN languages (http://www.unglobalcompact.org/issues/human_rights/tools_and_guidance_materials.html, last accessed 23 September 2013).

during those processes to identify interests related to business and human rights. These analyses also included human rights related aspects of other ISO 26000 issues, and processes to avoid business related human rights abuse. This fed into several sections of ISO 26000 while also promoting the implementation of the Guiding Principles through the human rights section (3.6). In most of these cases, the character of interaction was characterized by the cooptation of the norms contained in the Guiding Principles.

For ISO 26000, however, the interactional struggle on the application of the concepts of ‘due diligence’ or ‘sphere of influence’ carried an element of competition as regards regulatory effectiveness and legitimacy. The SRSB with his team sought to influence the ISO process to replace the ‘sphere of influence’ broadly by due diligence. In the end the ‘due diligence’ approach prevailed as regards human rights issues while sphere of influence also remained in use for other ISO issue areas (ISO 26000 clause 5, Wood 2011, Ruggie 2013). As a result, the convergence between the Guiding Principles and ISO 26000 is less uniform than that between the Guiding Principles and OECD’s Guidelines.

A good two years after the endorsement of the Principles, the major *effects* of the Guiding Principle’s implementation oriented interaction with other TBGI schemes fall into two different areas: a normative homogenization, and the regulatory capacity and performance of actors. None of these fit squarely with the issues identified by Eberlein *et al.* (2014: 13-14), thereby underscoring the broad spectrum of potential effects of transnational business governance interaction when state-based regulatory governance is included in the picture. In this case, the effect on other TBGI institutions is strengthened by the authority which the Guiding Principles carry as a UN initiative.

The homogenization of transnational business governance norms occurs in two key areas. First, as regards the corporate responsibility to respect human rights in accordance with the detailed elaboration of the Guiding Principles. This homogenization effect is found with the OECD Guidelines, IFC’s Performance Standards and ISO 26000 as well as several other TBGI instruments in the CSR areas, including the UN Global Compact and policy instruments like the EU’s 2011 CSR Communication (EU 2011). Second, as regards due diligence in the particular sense and with the particular elements and activities prescribed by the Guiding Principles. Contrary to static oriented financial due diligence exercises such as those which business organizations and their lawyers are familiar with, for example in the context of mergers or acquisitions, due diligence exercised in accordance with the Guiding Principles is an ongoing process for the duration of a particular activity. Human rights due diligence prescribed by the Guiding Principles should be undertaken to identify, prevent, mitigate and account for how a business organization addresses its adverse human rights impacts. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed (Guiding Principle 17). The OECD Guidelines’ and ISO 26000’s adoption of the Guiding Principles’ due diligence concept are particularly clear example of the homogenization.

In terms of regulatory capacity and actors’ performance, the endorsement with which the Human Rights Council as a UN institution provided the Guiding Principles as a transnational business governance instrument functioned as a stamp of salience on other TBGI institutions. This lent legitimacy to such other institutions, which allowed them to develop, expand or revise texts and as a result, expand their audiences, members and therefore regulatory space. The OECD’s 2011 revision of the Guidelines and ISO’s development of a detailed human rights Chapter in the ISO 26000 SR

Guidance Standard are among the most prominent examples. This effect is further evidenced by the *change over time*, which in the case of the OECD Guidelines includes a revitalization of the NCPs reflected in a number of organizational revisions (OECD 2011b, OECD 2012), the establishment of a Forum on implementing due diligence in the supply chain for certain minerals and gold (OECD website 2013a), and the development of a website and documents to provide due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas (OECD 2013, OECD website 2013b).

4.2.4. Following up: Monitoring and information gathering, compliance promotion and enforcement, and evaluation and review

At the time of writing a good two years after the adoption of the Guiding Principles it is still too early for a detailed assessment of the interactional aspects a regards follow-up to the rule-making and implementation, such as monitoring, compliance promotion and enforcement as well as review. Those issues are all highly significant for a full appreciation of the transactional strategy deployed by the Guiding Principles to follow up on the rule-formation by ensuring implementation in active collaboration with and though other TBGI institutions. To complete the picture, this section offers a brief overview but leaves detailed analysis for further study.

Just like the Guiding Principles interact with other TBGI institutions as regards implementation, much of the monitoring and information gathering as regards the business responsibility to respect human rights and remedies are exercised through the TBGI institutions with which the Guiding Principles interact. Monitoring and information gathering interaction include the Global Compact through its participants' Communication on Progress and the OECD Guidelines through complaints submitted to NCPs. Civil society organizations contribute in this respect, as they do in relation to the state duty to protect and its effects on business conduct in home and host states. As is the case for compliance promotion and enforcement, dimensions of interaction therefore largely resemble what was stated above in relation to implementation

There is no formal procedure for an evaluation and review of the Guiding Principles. However, several informal interactive processes may serve a similar objective. Key *actors* correspond to those that were instrumental in convincing the UN system and its Human Rights Commission/Council of the need to establish a transnational business governance instrument on business and human rights. New forms of interaction, such as networks, may evolve. The endorsement of the Guiding Principles is spurring a solidification of an emergent academic community comprising scholars of regulatory and governance disciplines, who will be well placed to conduct research and analysis on the effectiveness of the Guiding Principles, their implementation, monitoring, compliance promotion and enforcement. With continued globalization and awareness of the human rights impact of the global financial crisis, drivers and shapers are likely to include a combination of civil society and market pressure and lessons and needs of the implementing TBG institutions. Given the UN background, states may exercise significant influence to shape an evaluation and review as well as the outcome. Host states of transnational enterprises may interact with home states with explicit policies on CSR or business and human rights to establish a need for particular evaluations. Through their regular review of states' reports on human rights conditions, expert commissions under UN human rights treaties may question the conduct of certain businesses, the adequacy of states' regulatory efforts to implement their duty to protect, and provide guidance for both states and businesses to improve the understanding and application of the Guiding Principles to particular situations or as regards specific human rights. The UN's Office of the High Commissioner for Human Rights (OHCHR) may support this through analyses, which may involve interaction with

specific groups of victims of business-related human rights abuse, civil society, national human rights institutions, or state bodies, such as authorities implementing national business regulation.

Comparison between business reports (such as Global Compact Communication of Progress reports), NCPs (through cases reported on their websites or in the OECD Guidelines' annual reports), and states' action to encourage and enforce the responsibility to respect human rights (such as through states' reports to UN Human Rights expert committees) may function as *mechanisms and pathways* for evaluation and review. Analysis of experience with due diligence under the OECD Guidelines in relation to other issues than human rights, as well as experience with ISO 26000 in relation to human rights due diligence and 'sphere of influence' for other areas may also function as mechanisms for evaluation. The *character of interaction* may be diverse. In addition to orchestration organized from within the UN (the Working Group on Business and Human Rights, and the Office of the High Commissioner for Human Rights) and coordination, for example between the OECD and its many NCPs at state level, it may come to include competition between non-UN TBG institutions to seek to establish what model(s) of implementation of the Guiding Principles are the most effective.

Contrary to some of the non-state based TBG schemes discussed by Eberlein *et al.* (2014, esp. at 15) and their colleagues (Guldbrandsen 2014; Haufler 2012), the Guiding Principles are not likely to be revised frequently. Rather, as a UN soft law instrument, they themselves may be rather static with dynamic guidance offered by expert committees or the OHCHR. More importantly from the TBGI perspective, as a UN soft law instrument the Guiding Principles may evolve into a hard law instrument, *i.e.* a treaty setting out standards of conduct for business organizations. This would take broad agreement on the benefits of the standards contained in the Principles as a modality against adverse business impact on society. Such agreement would need to be sufficient strong not be counteracted through formal or informal interaction between actors opposed to a hardening of TBG norms on business and human rights into binding standards of conduct. A repeat of the fate of the Draft UN Norms would be a strong blow to the significance of state based regulatory governance in the TBG field. By contrast, a continuation of the acceptance and spread of the norms of conduct contained in the Guiding Principles through the forms of interaction with state and non-state bodies that is sketched above would add significant regulatory perspectives to (international) state-based governance as effective means of transnational business regulation. As is the case for the OECD Guidelines' broad adoption of due diligence, such regulation could go beyond human rights to include other CSR-related issues.

5. Conclusion

As a regulatory instrument adopted by the UN Human Rights Council, the UN Guiding Principles are unique in several respects of relevance transnational business governance interaction. This includes the multi-stakeholder development of this UN Human Rights instrument, which actively included business organizations as potential duty-holders; the normative combination of State duties and business responsibilities which informs the Guiding Principles; and the significant normative influence on other TBGI schemes within a brief time span of the adoption of the Guiding Principles. Importantly, it also includes the way in which the Guiding Principles as an instrument without detailed built-in implementation or enforcement modalities work through such other schemes. This applies to Global Compact Guidance and reporting and to the OECD Guidelines' broad recommendations of due diligence. It applies to the National Contact Points as complaints handling institutions with extraterritorial reach, and to financial activities supported by IFC. Through these

and the influence on ISO 26000, a transmission of elements of the UN Guiding Principles into private business governance may take place which may be applied by companies and in supply chain management across the world.

The application of the TBGI framework to the UN Guiding Principles demonstrates how non-enforceable transnational business governance is not only deployed by private or public-private organisations, but also public institutions. This applies even to institutions which like the UN Human Rights Council have a quasi-legislative role. Analysis of the Guiding Principles as interactional business governance suggests that this form of governance is capable of migrating from deployment by specialised private or public-private groups in specific sectors or regions, to becoming adopted by public institutions to regulate global sustainability concerns. The implications of this migration of experimentalist forms of governance from the private to the public sphere are potentially huge in terms of contributions to global regulation of sustainable development. The influence which the Guiding Principles have had on other TBGI instruments of various degrees of private and public dominance (from ISO 26000 through IFC's Performance Standards to the Global Compact) indicates the potential of international institutions regulating global sustainability concerns through transnational business governance and its interaction with other TBGI schemes for their implementation and enforcement. Offering a way around the political and institutional constraints of state-centrist international law, the approach may be deployed for the regulation of other sustainability issues that are affected by business: climate change, water and land usage, food security, and space exploration and exploitation are all potential candidates for transnational business governance. Their effective regulation requires public international law- and policy-makers to go beyond the state-centrist focus and actively interact with other public, public-private and private business governance schemes.

From a pragmatic perspective that does not disregard governance gaps but also does not accept the adverse impact on society that results from such gaps, engaging and regulating the private sector is a modality for international organisations like the UN to implement sustainability related objectives to complement or supplement the obligations of states. This is particularly salient when states lack the will to implement their international obligations in national law (leading to governance gaps). The TBGI approach shows the UN Guiding Principles as a bridge-builder that pragmatically cuts across the public and private regulatory spheres, not only drawing on both in combinations in order to reduce adverse business impact on society, but as indicated weaving into other regulatory initiatives in both fields. Due to the influence that the Principles have already had on regulatory business governance not only as regards but also beyond human rights, insight into the dimensions and components of the interactional aspects of this instrument and its implementation offers significant contributions to the literature on regulation, governance, business ethics and CSR.

By combining a range of actors, drivers, mechanisms and forms of interaction, transnational business governance interaction offers governmental and intergovernmental authorities opportunities to shape private sector action outside their formal regulatory boundaries. The TBGI approach to the Guiding Principles illustrates that diverse forms of interaction and components of regulatory governance offer opportunities not only to address governance gaps, but also to implement specific public policy goals beyond the traditional 'carefully policed boundaries' of national or international, public or private governance. With CSR no longer only 'beyond law' – one of the key impacts of the Guiding Principles, as evidenced for example by the EU's 2011 CSR definition (EU 2011) - regulators may even deploy this concept to go beyond the minimum

requirements of enforceable law by incorporating its normative drive into novel forms of governing business conduct.

Further research on the TBGI aspects of the Guiding Principles could uncover the regulatory perspectives through detailed analysis of the ways in which the Guiding Principles influence other TBGI schemes as well as sector-wise or regional public, public-private or private business governance. Further research perspectives on potential for regulation of global sustainability concerns include a detailed elucidation of transnational governance features relating to the rule-making process of the Guiding Principles, and analysis of the effectiveness of implementation through interaction with other TBGI schemes. Such insight may be applied in other public or public-private regulatory initiatives targeting business governance.

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